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No. 09-_____

In the Supreme Court of the United States

JOSE ANAYA-AGUILAR,
Petitioner

v.

ERIC H. HOLDER
Attorney General of the United States,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly hold in this case relying on *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom Kucana v. Holder*, --- S.Ct. ---, 2009 WL 1107926 (Apr. 27, 2009) that the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii), which bars judicial review of "any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General," precludes judicial review of agency decisions on motions to reopen?

II. Does 8 U.S.C., §1252(a)(2)(D), which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding [judicial] review of constitutional claims or questions of law, as interpreted by the Seventh Circuit as limited to pure questions of law constitute a further restriction on judicial review?

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OPINIONS BELOW

On November 8, 2007, a petition for review was filed in the Seventh Circuit, *Jose Anaya-Aguilar v. Michael Mukasey*, Case Nos. 07-3701 and 08-1367. On November 19, 2008, the Seventh Circuit in an unpublished and non-precedential decision denied the petition for review for lack of jurisdiction under 8 U.S.C. §1252(a)(2)(B)(ii). Appx. 3a-4a.

On December 23, 2008, a petition for rehearing was filed in the Seventh Circuit, *Jose Anaya-Aguilar v. Michael Mukasey*, Case No. 08-1367. On February 23, 2009, the Court denied rehearing in a memorandum order. Appx. 2a

JURISDICTIONAL STATEMENT

The judgment of the court of appeals for the Seventh Circuit denying the petition for rehearing was entered on February 23, 2009. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Section 1252(a) of the Immigration Act, as amended, provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review-

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or

operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1) (B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. §1252(a)(2)(D) states:

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. §1252(a)(5) states:

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. §1252(b)(6) states:

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

8 U.S.C. §1252(b)(9) states:

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. §1229a provides in pertinent part:

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

8 U.S.C. §1229a(c)(6) states in pertinent part:

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

8 C.F.R. §1003.2 states in pertinent part:

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is

later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c))

may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

STATEMENT

This case concerns whether, as the Seventh Circuit held in this case relying on *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom Kucana v. Holder*, --- S.Ct. ----, 2009 WL 1107926 (Apr. 27, 2009),the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii) which bars judicial review of decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General" applies to judicial review of the Board of Immigration Appeals ("BIA") denials of motions to reopen and reconsider. Appx. 3a-4a. In the decision below, the Seventh Circuit relied on its precedent in *Kucana* to conclude that §1252(a)(2)(B)(ii) deprived it of jurisdiction over the BIA decisions denying petitioner's motions to reopen and to reconsider. *See Anaya-Aguilar v. Mukasey*, 302 Fed. Appx. 481, 483 (7th Cir. Dec. 9, 2008). Appx. 3a-4a. This Court has granted certiorari in *Kucana* to resolve the split between the Seventh Circuit and ten other circuits on the question whether §1252(a)(2)(B)(ii) deprives the Courts of Appeals of jurisdiction to review BIA decisions denying such motions. As this Court has granted certiorari to review precisely the question raised in petitioner's case it should grant certiorari in this case and hold for *Kucana*.

A serious split of authority exists between the Seventh Circuit and other circuit courts as to the scope of the jurisdictional provisions of the Real ID Act, specifically the provisions of 8 U.S.C. §1252(a)(2)(B), that undermines the uniformity between various circuit courts as to federal court jurisdiction and aliens' access to judicial review. Petitioner asks this court to resolve whether 8 U.S.C.

§1252(a)(2)(B)(ii) can be applied to any discretionary decision, including decisions not specified by statute as discretionary, so as to deprive an alien of judicial review.

In contrast to the majority of circuit courts, the Seventh Circuit has concluded that it lacks jurisdiction to review a decision of the BIA declining to reopen a removal hearing because it is a discretionary decision under the Attorney General's regulations governing motions to reopen, 8 C.F.R. §1003.2. The Seventh Circuit has further restricted judicial review by interpreting 8 U.S.C. §1252(a)(2)(D) to allow review only of pure questions of law and constitutional claims, excluding questions of application of law to undisputed or adjudicated facts. If habeas jurisdiction is not available, the Seventh Circuit's interpretation of the judicial preclusion provisions of the REAL ID Act deprives persons such as the Petitioner of any judicial review and is unconstitutional.

A. Statutory Framework:

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), which had, as its purpose "to further clarify and streamline . . . judicial review of deportation and exclusion orders." S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). Section 1252(a) of IIRIRA specified that judicial review of a final order of removal is governed by Chapter 158, Title 28 (Hobbs Act). IIRIRA repealed the judicial review provisions of the Immigration and Nationality Act of 1961, 8 U.S.C. §1105a, *et seq.*, including the provisions allowing habeas corpus relief for aliens under exclusion orders or aliens under deportation orders who were in custody.

Section 1252(a)(2)(C) barred courts from reviewing any removal order issued against an alien who had

committed specified offenses, without regard to the date of their commission. Another jurisdiction-stripping provision, 8 U.S.C. §1252(a)(2)(B)(i), barred judicial review of enumerated applications for discretionary relief, and 8 U.S.C. §1252(a)(2)(B)(ii) barred judicial review of any other decision ". . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." Section 1252(b)(9) of 8 U.S.C. consolidates all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States in a single removal proceeding.

IIRIRA eliminated the old remedy of suspension of deportation, substituting the remedy of cancellation of removal for certain permanent residents and for certain nonpermanent residents. 8 U.S.C. §§1229b(a) and (b). Petitioner, had applied for such relief and needed to establish (1) physical presence in the United States for a continuous period of ten years preceding the date of such application; (2) good moral character; (3) a lack of a conviction for specified criminal offenses; and (4) exceptional and extremely unusual hardship to his two minor children who are United States citizens.

Prior to IIRIRA, authority over motions to reopen and reconsider was conferred by regulation, 8 C.F.R. §1003.2, that enabled aliens to present new evidence previously not available or discoverable or to file new applications for relief could not have been presented in the earlier proceeding. The regulation specified that decisions regarding such motions were discretionary.

IIRIRA created a one-time statutory right to petition to reopen within 90 days of the final administrative order and permitted one motion to reconsider to be filed within 30 days of the last administrative order. 8 U.S.C.§§1229a(c)(7)(A)-(B). Judicial review of the denial of such motions was provided

by 8 U.S.C. §1252(b)(6) consolidating review of such motions with review of a final removal order.

In deciding whether AEDPA and IIRIRA foreclosed habeas corpus relief by implication, the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), concluded that neither §401(e) of AEDPA, §1252(a)(1), §1252(a)(2)(C) nor §1252(b)(9) of IIRIRA prohibited habeas corpus review because the acts did not contain a clear statement of Congress' intention to bar habeas corpus relief under 28 U.S.C. §2241. The Supreme Court concluded that, if the statutes could be interpreted to bar habeas corpus, it would create a serious constitutional question because the Suspension Clause, which protects the privilege of the habeas corpus writ, unquestionably requires some judicial review in deportation cases, citing, *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). 533 U.S. at 300. The Court noted that historically, habeas corpus addressed questions of law in the context of discretionary relief in immigration cases, as well as the application or interpretation of statutes, citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77, 77 S.Ct. 618 (1957) and *Jay v. Boyd*, 351 U.S. 345, 354, 76 S. Ct. 919 (1956)("Courts may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion.") 533 U.S. at 305, 307-8.

In 2005, Congress amended IIRIRA by enacting the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, which added to 8 U.S.C. §§1252(a)(2)(A) and (2)(B), the following language:

> Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of title 28, United States Code, or any other habeas corpus provisions and sections 1362 and 1651 of such title, no court shall

have jurisdiction to review . . ."

The same language appears in 8 U.S.C. §1252(a)(4), §1252 (a)(5) and §1252(b)(9). A new section, 8 U.S.C. §1252(a)(2) (D) provides that "[n]othing in . . . any . . . provision of this chapter . . . which limits or eliminates judicial review shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review."

B. Proceedings Below:

Jose Anaya-Aguilar was born in the town of Huetzuco, Guerrero, Mexico, pop. 4,500, in the State of Guerrero, Mexico on January 14, 1969. Appx. 10a - 11a, 28a His father was a farmer; his mother was a homemaker. Appx. 33a-35a. One of 12 siblings, he did not attend school in Mexico because his family was too poor to send him. Appx. 42a. At nineteen years of age, petitioner entered the United States without inspection and he has lived in the United States for more than half his life. Appx. 7. Removal proceedings were instituted in October 2003 and he retained attorney Raul Villasuso to represent him. Appx. 15a. Villasuso filed an application for cancellation of removal supported only by petitioner's marriage certificate and the birth-certificate of his oldest son, Jose. Appx. 21a

On the day of the merits hearing and contrary to the rules of practice of the Immigration Court that required submissions to be made 15 days in advance of the hearing, Villasuso presented a few more documents to establish continuous physical presence: (1) a letter confirming Petitioner's employment with Rozoni Lawn Service from April 15, 1988 to May 27, 1988; (2) some pay stubs dating from October 1990 to 2006, (5) a vehicle sales tax return submitted on 05/24/1995; (6) a receipt for car repairs dated 06/03/96, (7) a W-2 statement for 1997; (8) a

birth certificate of a second son, Daniel, born on February 8, 2003 in Skokie, Illinois, and (9) petitioner's marriage certificate to Rosa Colon. The Immigration Judge noted that the documentation presented was "sketchy" Appx. 34a.

The August 27, 2004, hearing in petitioner's case on the merits of his application was brief, as evidenced by 19 pages of transcript. Appx. 31a-50a. In an attempt to establish hardship, Villasuso asked his client: "What would happen with your child if you were removed to Mexico?" Appx. 39a. Petitioner replied "He would suffer a great deal because I would not know how to do it." *Id.* His wife and children, he testified, could not live with him in Mexico because he did not have a house there and could not find a job in Mexico. Appx. 40a. As a self- employed repair person in the United States, he earned $400-$500 per week, whereas in Mexico he would earn $50 a week. Appx. 41a.

The immigration judge denied the application for failure to meet the standard of hardship for cancellation of removal and specifically noted that there were no medical issues. Appx. 48a-49a. She granted Petitioner voluntary departure. Id. Villasuso reserved appeal and filed a notice of appeal to the Board. Petitioner posted a $500.00 voluntary departure bond. Appx. 50a. On June 2, 2005, the BIA affirmed the decision of the Immigration judge and entered an order extending voluntary departure for an additional 30 days. Villasuso did not notify his client that the BIA had dismissed his appeal and that he had 30 days to leave the United States voluntarily or be subject to an order of removal.

Over a period of two years, petitioner vainly sought information from his attorney about the status of his case. When he did make contact with the attorney, he was always advised that his case was pending. Appx. 12a. When petitioner received a notice from the office of Immigration and Customs Enforcement, dated March 30,

2007, that the $500.00 bond he posted to guarantee his voluntary departure had been forfeited because he failed to depart, he faxed the notice to Villasuso, asking him what the paper meant and what he was to do. Appx 11a-12a. Villasuso again lied to petitioner, stating that his case had not yet been decided by the Board. Id. At that point, petitioner demanded a copy of his immigration file from the attorney in order to consult with other counsel. On May 7, 2007, he finally received a copy of his immigration file, but it did not contain a copy of the Board's final order.

On May 21, 2007, petitioner filed a motion to reopen the removal proceeding, alleging that he had been the victim of ineffective assistance of counsel and that his former attorney had failed to properly submit evidence as to his good moral character and extraordinary hardship. Appx. 10a-18a. He alleged that his former attorney had concealed the fact that the BIA had entered a final order on June 5, 2005, dismissing his appeal and granting him the privilege of voluntary departure within 30 days of its order. Appx. 17a. By the time he understood what had happened in his case, he had lost the opportunity to depart voluntarily; he had forfeited the voluntary departure bond that he posted to guarantee his departure; he was under an order of removal that barred him from reentering the United States for 10 years; he had lost the opportunity to seek judicial review and/or to file a timely motion to reopen within the 90-day period authorized by law to present new evidence.

To show how he was prejudiced by his former attorney's preparation of the original application for cancellation of removal, petitioner presented an amended application for cancellation of removal, supported by 163 pages of documents, consisting of medical records relating to petitioner and his two U.S. citizen sons showing that in 2001 petitioner was treated for glaucoma and had lost

vision in one eye., Appx. 19a; that beginning in infancy, his sons had experienced bouts of asthma, bronchitis and pneumonia; and that one son was deathly allergic to mosquito bites. Appx. 20a. His medical condition was relevant to demonstrate that he would not be able to find adequate employment in Mexico because of his visual disabilities and he would not be able to support his sons. He submitted articles describing the environmental conditions in Mexico that would adversely affect the respiratory problems that he and his sons frequently experience. To establish good moral character, he submitted letters of appreciation from persons for whom he had provided good services. Appx. 21a.

The BIA denied the motion, stating that petitioner had not demonstrated due diligence in discovering the facts of his immigration status and the ineffective assistance of counsel, despite uncontested facts showing that petitioner could have established threshold eligibility for that relief but for his lawyer's incompetence. Appx. 8a -9a. The Board concluded that it could not decide the issue of due diligence because a page of the petitioner's supporting affidavit was missing. Appx. 10a-11a. It concluded that the attorney/client relationship between petitioner and Villasuso began with his appeal to the BIA, contrary to the evidence that Villasuso represented petitioner from the beginning of the immigration court proceedings. *Id.*

Petitioner filed a motion to reconsider to correct the BIA's mistake as to the date of Villasuso's representation and he resubmitted his supporting affidavit with the missing page. The BIA denied reconsideration, characterizing the motion as a motion to reopen, which it held was time and numerically barred. Appx. 6a - 7a

REASONS FOR GRANTING THE PETITION

This case concerns whether, as the Seventh Circuit held in *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom* Kucana v. Holder, --- S.Ct. ----, 2009 WL 1107926 (Apr. 27, 2009), the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii), which bars judicial review of decisions . . . "the authority for which is specified under this subchapter to be in the discretion of the Attorney General. . ." also precludes judicial review of agency decisions on motions to reopen. In the decision below, the Seventh Circuit relied on *Kucana* to conclude that §1252(a)(2)(B)(ii) deprived it of jurisdiction over petitioner's motion to reopen and motion to reconsider because they were discretionary decisions according the Attorney General's regulation, 8 C.F.R. §1003.2(c). *See Anaya-Aguilar v. Mukasey*, 302 Fed. Appx. 481, 483 (7th Cir. Dec. 9, 2008). This Court has granted certiorari in *Kucana* to resolve the split between the Seventh Circuit and ten other circuits on the question whether §1252(a)(2)(B)(ii) deprives the Courts of Appeals of jurisdiction to review BIA decisions denying motions to reopen and reconsider. As this Court has granted certiorari in *Kucana*, and the same issue is raised in petitioner's case, it should grant certiorari in this.

I.

THE SEVENTH CIRCUIT'S INTERPRETATION OF 8 U.S.C. §1252(a)(2)(B)(ii) AS PRECLUDING JURISDICTION TO REVIEW DENIALS OF MOTIONS TO REOPEN IS INCORRECT.

In a series of cases, the Seventh Circuit has interpreted the provisions of 8 U.S.C. §1252(a)(2)(B)(ii) as depriving it of jurisdiction to review an immigration judge's denial of a continuance because the statutory authority for such discretion derives from 8 U.S.C. §1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."), *Ali v. Gonzales*, 502 F.3d 659, 664 (7th Cir. 2007), cert. denied, 128 S. Ct. 1870 (2008), relying on *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007) which, in turn, cited *Powerex Corp. v. Reliant Energy Servs.*, 547 U.S. 1067, 126 S. Ct. 1826 (2006) for the proposition that when a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion. See *Singh v. Dept. of Homeland Security*, 517 F.3d 638, 647, n .11 (2d Cir. 2008), specifically rejecting the reasoning of *Leguizamo-Medina*.

In effect, the Seventh Circuit decided it lacked the power to review any discretionary decision that precedes a removal order. *Leguizamo-Medina v. Gonzales*, *supra*. Building on that precedent, the Seventh Circuit applied its interpretation of 8 U.S.C. §1252(a)(2)(B)(ii) to bar review of the BIA's denials of motions to reopen. *Kucana v. Mukasey*, *supra*; and *Huang v. Mukasey*, 534 F.3d 618 (7th Cir. 2008), finding the authority for characterizing such decisions as discretionary in the Attorney General's regulations, 8 C.F.R. §1003.2, governing motions to reopen and motions to reconsider. In *Kucana*, there were strong

dissenting opinions from five members of the court. 553 F.3d 539-42.

A majority of circuit courts have come to the opposite conclusion by construing §1252(a)(2)(B)(ii) according to its plain language requiring that such discretion must be specified in the statute, i.e., §§1151-1378, and therefore have reviewed denials of motions to reopen and decisions on continuances under an abuse of discretion standard. *Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1360-62 (11th Cir. 2006); *Khan v. Att'y Gen. of the U.S.*, 448 F.3d 226, 231-32 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-37 (5th Cir. 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 198-99 (2d Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632-34 (6th Cir. 2006); *Alaka v. Att'y Gen.*, 456 F.3d 88, 97 (3d Cir. 2006)("[t]here are no less than thirty-two additional provisions in the very sub chapter of the INA referenced by 8 U.S.C. §1252(a)(2)(B)(ii) that make explicit the grant of 'discretion' to the Attorney General or the Secretary of Homeland Security."); *Mozano-Garcia v. Gonzales*, 413 F.3d 462 (5th Cir. 2005).

While the Tenth Circuit had concluded that it lacked jurisdiction to review an immigration judge's denial of a continuance, *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004), it also decided that it could review decisions of the BIA denying motions to reopen under an abuse of discretion standard. *Kucekar v. Gonzales*, 500 F.3d 1081 (10th Cir. 2007). The Eighth Circuit, having previously concluded that it lacked jurisdiction over discretionary decisions, *Onyinkwa v.Ashcroft*, 376 F.3d 797 (8th Cir. 2004), has reversed course and interpreted the statute according to its plain language. *Miah v. Mukasey*, 519 F.3d 784, 789 (8th Cir. 2008) ("The statute applies to decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . The

discretion to grant or deny motions to reopen or reconsider is conferred by the Attorney General's regulations, not by statute. See 8 C.F.R. §1003.2. Thus, we have continued our long-standing practice of reviewing the denial of motions to reopen for abuse of the BIA's discretion.").

The Seventh Circuit's interpretation of what is discretionary and therefore, not subject to review, runs against the strong presumption favoring judicial review of administrative action. *INS v. St. Cyr*, 533 U.S. at 298; *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 120 S.Ct. 1084 (2000). Through the actions of his former counsel, petitioner has never had the opportunity to obtain judicial review in the Seventh Circuit. Under like circumstances in another circuit, he could have obtained judicial review.

II.

THE SEVENTH CIRCUIT INCORRECTLY INTERPRETS 8 U.S.C. §1252(a)(2)(D) AS CONFERRING JURISDICTION TO REVIEW ONLY PURE QUESTIONS OF LAW OR CONSTITUTIONAL CLAIMS AND IS A FURTHER RESTRICTION ON JUDICIAL REVIEW

In this case, the court concluded that petitioner did not raise any constitutional claim or question of law that merited judicial review. The Seventh Circuit's declaration that it will review only "pure" questions of law and constitutional claims amounts to a further limitation on judicial review. As this Court noted in *INS v. St. Cyr*, 533 U.S. at 289 " . . . the scope of habeas review available in §2241 petitions by aliens challenging removal orders included constitutional issues and errors of law, including statutory interpretations and application of law to undisputed facts or adjudicated facts . . . ."

CONCLUSION

As this Court has granted certiorari in *Kucana v. Mukasey*, *supra*, to review precisely the question raised in petitioner's case it should grant certiorari in this case in light of *Kucana*.

Respectfully submitted,

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